Supreme Court, U.S.
FILED

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH W. OLMSTEAD,

Petitioner,

v.

WALTER INDUSTRIES, INC.,
d.b.a. Mid State Homes, Inc.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petition respectfully submitted by:
Joseph W. Olmstead, *pro se*
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36 pp

QUESTIONS PRESENTED FOR REVIEW

1. What constitutes a valid notice of appeal filed by a *pro se* party to seek review of issues disposed of in the District Court in separate non-final summary judgment orders and fully briefed in an initial brief and reply brief filed in the United States Courts of Appeals?

2. What level of privacy is afforded medical records, when requested by an employer to be submitted and stored in personnel files, and should those records be accessible by persons without medical training or need for such data, such as payroll clerks and other employees?

3. Should an employment action be dismissed with prejudice with no type of relief available if the record identifies material issues of fact, as presented in timely submissions of sworn testimony, depositions and other documents?

LIST OF PARTIES TO THE ACTION

Joseph W. Olmstead, *pro se*, Petitioner

Walter Industries, Inc., Respondent

Mid State Homes, Inc., Subsidiary of Walter Industries, Inc., Respondent

TABLE OF CONTENTS

Description	Page Nos.
Table of Contents	1
Table of Authorities	2
Index of Appendices	3
Opinions Below	4
Statement of Jurisdiction	5
Constitutional and Statutory Provisions Involved	6-7
Statement of the Case	8-13
Reasons for Granting the Writ	13-22
Conclusion	23
Proof of Service	Filed separately
Appendices	Labeled as A-D

TABLE OF AUTHORITIES

Becker v. Montgomery, Attorney General of Ohio, et al. (Case 00-6374), decided May 29, 2001, page 19

Bennett v. Spear, 117 S.Ct. 1154, 1164 (1997), page 16

Berman v. Orkin Exterminating Co., Inc., 160 F.3d 697, 701-02 (11th Circ. 1998), page 20.

Bragdon v. Abbott, 118 S.Ct. 2196 (1998), page 14.

Braxton v. US, 111 S.Ct. 1854, 1857 (1991), page 13.

Foman v. Davis, 83 S.Ct. 227 (1962), page 19.

Gupta v. Florida Bd. of Regents, 212 F.2d 571, 587 (11th Circ. 2000), page 17.

Hishon v. King & Spalding, 104 S.Ct. 2229 (1984), page 17.

Norman-Bloodsaw v. Lawrence Berkely Laboratory, 135 F.3d 1260 (9th Circ. 1998), page 18.

PGA Tour, Inc. v. Martin, 532 U.S._(2001), page 21.

Reeves v. Sanderson Plumbing Products, Inc., 120 S.Ct. 2097 (2000), page 16.

Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, S.Ct., Case No. 00-1089, Decided January 8, 2002, page 20.

INDEX OF APPENDICES

Appendix A - Opinion of the United States Court of Appeals for the Eleventh Circuit, entered on October 24, 2001.

Appendix B - Opinion of the United States District Court for the Middle District of Florida, entered on February 26, 2001.

Appendix C - Order of the United States Court of Appeals for the Eleventh Circuit denying petition for rehearing, entered on November 28, 2001.

Appendix D - Order of the United States Court of Appeals for the Eleventh Circuit granting stay and stay of issuance of mandate, entered on December 27, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals, entered on October 24, 2001, appears at Appendix A to the petition and is unpublished.

The opinion of the United States District Court, entered on February 26, 2001, appears at Appendix B to the petition and is unpublished.

STATEMENT OF JURISDICTION

The date on which the United States Court of Appeals decided this case was October 24, 2001.

A timely petition for rehearing was denied by the United States Court of Appeals on November 28, 2001; and a copy of the order denying rehearing appears at Appendix C.

A motion for stay and stay of the issuance of the mandate was granted by the United States Court of Appeals on December 27, 2001; and a copy of the order appears at Appendix D.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

I certify that all jurisdictional requirements, including payment of filing fees, preparation of documents in the form prescribed by the Rules of this Court, service to all parties (and filing of proof with the Clerk), have been timely completed and in good faith.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This is a case seeking relief provided by the Americans with Disabilities Act, 42 U.S.C. 12112(a) ("the ADA"), which provides, in pertinent part with respect to this petition:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 1630.4 and Section 1630.12 of 29 Code of Federal Regulations (Equal Employment Opportunity commission), Chapter XIV (7-1-98 Edition) provide, in pertinent part:

> Sec. 1630.4 - Discrimination prohibited
>
> It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual with a disability in regard to:
>
> (a) Recruitment, advertising, and job application procedures;
>
> (b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff,

termination, right of return from layoff, and rehiring; ....
(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the covered entity; ...; and

(i) Any other term, condition, or privilege of employment."

Sec. 1630.12 - Retaliation and coercion

(a) *Retaliation.* It is unlawful to discriminate against any individual because that individual has opposed any act or practice made unlawful by this part or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing to enforce any provision contained in this part."

Sections 1630.4 and 1630.12 of 29 CFR, CH. XIV.

BRIEF STATEMENT OF THE CASE

This is an action seeking relief provided in the Americans with Disabilities Act, 42 U.S.C. 12112, *et seq.* with respect to issues arising out of an employment relationship between the parties: Joseph W. Olmstead, proceeding *pro se* ("petitioner") and Walter Industries, Inc., d.b.a. Mid State Homes, Inc. ("respondent"). [1]

As was included in the Statement of Jurisdiction (VI) in the initial brief timely filed in the United States Court of Appeals for the Eleventh Circuit, petitioner stated:

> "Pursuant to 11th Cir.R.28-1(g) and F.R.A.P. R. 28(a), Employee states:
>
> (i) Jurisdiction was conferred to the United States District Court for the Middle District of Florida, Tampa Division, by 28 U.S.C. 1331, which provides: "The district courts shall have original jurisdiction of all civil actions

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[1] Walter Industries, Inc. employs approximately 8,100 persons. Mid State Homes, Inc. is a subsidiary which employs more than 30 persons and shares offices and administrative functions with other departments and subsidiaries at the corporate offices of Walter Industries, Inc., where Petitioner worked. Employee identification badges, personnel handbooks, telephone listings and other materials reflect the employer as "Walter Industries, Inc."

arising under the Constitution, laws or treaties of the United States." A Complaint (R-1-1) was filed in the District Court on March 31, 1999 pursuant to notice of dismissal and notice of rights served by the Equal Employment Opportunity Commission[2] on December 31, 1998.

(ii) The United States Court of Appeals for the Eleventh Circuit has jurisdiction pursuant to 28 U.S.C., Section 1291, which provides: "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States...". A Final Order (R-5-141) was entered on February 26, 2001. A notice of appeal (R-5-143) was filed and served on February 28, 2001. Employee

---

2 The Equal Employment Opportunity Commission (EEOC) conferred jurisdiction to the City of Tampa Human Rights Office (THRO) in September 1997. In September 1997 and December 1997, THRO invited the parties to attempt to resolve the issues (with the exception of privacy of medical records, as THRO did not have jurisdiction) through informal methods, which respondent declined. In January 1998, THRO administratively closed the file and referred the matter to the EEOC's District Office; and a right-to-sue notice was served on December 31, 1998. (R-1-1).

certifies that all other jurisdictional requirements have been met, including with respect to payment of filing fees and costs (R-5-143; R-5-146); and (a) this appeal is from a final order that disposes of all claims with respect to the parties in this action."

The notice of appeal (R-5-143) filed and served in this action on February 28, 2001 stated as follows:

Notice of Appeal

Notice is hereby given that Joseph W. Olmstead, Plaintiff, proceeding *pro se*, in the above named case, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from an Order (Dkt. #141) dismissing the amended complaint and denying all pending motions and requests for relief, including with respect to alleged interference of privacy of medical and personal information, entered in this action on February 26, 2001.

Dated this 28th day of February, 2001.

/s
Joseph W. Olmstead, *pro se*"

With respect to the relief sought in the United States Court of Appeals, petitioner summarized

the issues and fully briefed each issue, pointing to portions of the record, including deposition testimony, affidavits and other materials permitted by a Court Order[3] entered on August 24, 2000, and citations of authorities in support of the relief requested; and those issues were presented as follows in Section VII of the initial brief:

> "1. The issues presented for review in this employment case concern rights secured under the Americans with Disabilities Act, 42 U.S.C. 12112, *et seq.* regarding benefits and privileges with respect to Employer's Group Long Term Disability Benefits Plan, including regarding an employee certified by a medical doctor to return to active service (R-4-114-2).
>
> 2. This case also presents issues concerning confidentiality of medical

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[3] On June 2, 2000, an Order (R-3-68) was entered by the District Court, which granted in part and denied in part Defendant's Motion for Summary Judgment. After entry of this Order, the case was transferred in the District Court on two occasions. The Court Order allowing discovery on post-employment issues was entered by the Court on August 24, 2000. As this Court requires that a *concise* statement of the proceedings be included in the body of the petition, petitioner has not restated the dates of each proceeding in the District Court.

records furnished to Employer and Employer's Agents (R-5-131-unnumbered pages 4-6); and utilization, dissemination and transmission of protected records, including physician office notes (R-3-74-2; R-3-74-8).

3. This case also presents issues concerning alleged retaliation, as Employee alleges that after rights were exercised, Employer's characterizations of Employee's performance and work habits changed (from "Excellent performance" and comments of "...good attitude and dependable" to other unfounded derogatory characterizations which remain a material issue of fact) (R-3-74-2; R-1-21; R-3-71-Ex.)."

On page xiv of the Response Brief, respondent, respondent briefed one issue (#1 above) and listed the Statement of the Issue as follows:

"STATEMENT OF THE ISSUE

Whether Walter Industries has discriminated against the Plaintiff in violation of the Americans with Disabilities Act, 42 U.S.C. 12112, *et seq.* (the "ADA") with respect to its group benefits plan."

In the Opinion of the United States Court of Appeals issued on October 24, 2001 (Appendix A), the Court of Appeals reviewed the three

issues and set forth the Court's Decision regarding the issues, including with respect to the alleged retaliation, in which the Court stated that the retaliation claim would not be reviewed on the merits, as the claim was not set forth in the notice of appeal.

REASONS FOR GRANTING THE WRIT

A. General Requirements of this Court

Petitioner is mindful that review on a writ of certiorari is not a matter of right, but of judicial discretion and that a petition must present substantial questions. Supreme Court Rule 10.

As petitioner has requested review in part with respect to application of the law among Circuit Courts of Appeals, Plaintiff cites to *Braxton v. U.S.*, 111 S.Ct. 1854, 1857 (1991):

> "A principal purpose for which we use or certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts, at least as far as their continuation into the future is concerned. Obviously, Congress itself can eliminate a conflict concerning a

statutory provision by making a clarifying amendment to the statute, and agencies can do the same with respect to regulations. Ordinarily, however, we regard the task as initially and primarily ours."

B. Reasons why review by this Court of this case raises issues of public importance

While this is an employment action which concerns two parties, the issues raised in this case concern issues which could reasonably be considered of national importance, including (a) with respect to medical records, (b) redress for alleged retaliatory acts or omissions after exercising in good faith rights secured by Federal law, and (c) with respect to procedures which must be completed by a *pro se* litigant seeking relief in good faith.

C. Statement that petitioner has standing and meets the statutory requirements

As petitioner is a person living with HIV Disease, and as a record was established in both the District Court and subsequent proceedings in the Court of Appeals, petitioner cites to this Court's Decision in the matter of *v. Abbott*, 118 S.Ct. 2196, 2204, 2207 (1998):

"Respondent's HIV infection is a physical impairment....OLC [Office of Legal Counsel of the Department of Justice]

> determined ... HIV was a physical impairment under the Rehabilitation Act because it constituted a 'physiological disorder or condition affecting the hemic and lymphatic systems."
>
> "HIV infection satisfies the statutory and regulatory definition of a physical impairment during every stage of the disease."

D. Statement of award of summary judgment on claims pertaining to Group Plan and alleged interference of privacy of medical information

While petitioner is mindful that the purpose of the summary judgment rule is to save time and costs to the Court and parties, as petitioner proffered testimony of a former payroll clerk, which indicated that detailed medical records were stored in personnel files and accessible by employees such as payroll clerks and others, (including those with no medical training or need for such information), and as respondent allegedly used other criteria and procedures with respect to petitioner's request to be considered for *vacant* positions and refused to correct its records regarding petitioner's employment record and characterizations of the same which changed after rights were exercised and allegedly caused pecuniary and non-pecuniary damages, petitioner respectfully states that this issue should have been allowed to be presented at a trial. In support, petitioner cites to the following cases:

"Thus, while a plaintiff must 'set forth' by affidavit or other 'specific facts,' to survive a motion for summary judgment, Fed. Rule Civ. Proc. 56(e), and must ultimately support any contested facts with evidence adduced at trial, '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" (citations omitted). *Bennett v. Spear*, 117 S.Ct. 1154, 1164 (1997).

"In attempting to meet his or her ultimate burden of persuading the trier of fact that defendant intentionally discriminated, employment discrimination plaintiff must, once defendant employer produces sufficient explanation to support a nondiscriminatory explanation for its decision, be afforded the opportunity to prove by a preponderance of evidence that the legitimate reasons offered by defendant were not its true reason, but were a pretext for discrimination; that is, plaintiff may attempt to establish that he was the victim of intentional discrimination by showing that employer's proffered explanation is unworthy of credence." *Reeves v. Sanderson Plumbing Products, Inc.*, 120

S.Ct. 2097, 2106-08 (2000).

With respect to petitioner's request to be considered for *vacant* positions consistent with respondent's group plan, petitioner cites to the following case:

> "A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract, simply not to provide the benefit at all." *Hishon v. King & Spalding*, 104 S.Ct. 2228, 2233-34 (1984).

The Eleventh Circuit has defined an adverse employment action as follows:

> "An adverse employment action is an ultimate employment decision, such as discharge or failure to hire, or other conduct that 'alters the employee's compensation, terms, conditions or privileges of employment, deprives him or her of employment opportunities, or adversely affects his or her status as an employee". *Gupta v. Florida Bd. of Regents*, 212 F.2d 571, 587 (11th Circ. 2000).

> With respect to the issue of alleged interference of privacy of medical information, there appears to be some difference between the United States

Courts of Appeals for the Eleventh Circuit and Ninth Circuit, as the Eleventh Circuit stated, in part, that "There is no provision of the ADA granting Olmstead the privacy he claims." Opinion, Appendix A.

"ADA imposes no restriction on scope of employee entrance examinations, but only guarantees confidentiality of information gathered and restricts use to which employer may put the information." *Norman-Bloodsaw v. Lawrence Berkely Laboratory*, 135 F.3d 1260 (9th Circ. 1998).

With respect to the Opinion of the United States Court of Appeals for the Eleventh Circuit which did not review the retaliation claim on the merits due to a defect in the notice of appeal, while petitioner is aware that noticing and all other requirements are jurisdictional in nature, petitioner respectfully states that defect in the notice could be construed as non-fatal, as the appeal was from a final order, the respondent was not prejudiced and had an opportunity to brief the claim. In support, petitioner cites with favor to a Decision of this Court and an Opinion of the United States Court of Appeals for the Eleventh Circuit:

"An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party

whose intent to appeal is otherwise clear from the notice." Imperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, to which appellate court. See, *e.g., Smith* v. *Barry*, 245, 248–249. Pp. 8–10." The case was reversed and remanded. *Becker v. Montgomery, Attorney General of Ohio, et al.* (Case No. 00-6374), decided May 29, 2001.

In *Foman v. Davis*, 83 S.Ct. 227 (1962), this Court stated, in part that "It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. " at 230.

"Absent direct evidence of discrimination, a plaintiff in a retaliation case must establish prima facie case by showing that (1) the plaintiff engaged in statutorily protected activity; (2) the employer took an adverse employment action against him; and (3) there is a casual connection between the protected activity and the adverse action....In order to state a retaliation claim, the plaintiff need only show that he had a 'reasonable belief' that an unlawful employment practice was that the employer actually engaged in an unlawful employment

practice." *Berman v. Orkin Exterminating Co., Inc.*, 160 F.3d 697, 701-02 (11th Circ. 1998).

E. Information regarding cases and application of the ADA to which relief is sought

As this is an action seeking relief provided by the Americans with Disabilities Act ("the ADA"), it would appear reasonable to note that this Court has recently decided a case seeking relief under the ADA. In this Court's Decision of January 8, 2002, in the matter of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, U.S. S.Ct. Case No. 00-1089, the Court set forth the text of the law and various requirements in this regard, including the following:

> "The ADA requires covered entities, including private employers, to provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. 12112(b)(5)(A)(1994 ed); see also 12111(2). ("The term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee.") The Act defines a "qualified individual with a disability" as "an individual with a

disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 12111(8). In turn, a "disability" is:

"(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

"(B) a record of such impairment; or

"(C) being regarded as having such an impairment."
12102(2)."

Section II of Opinion in the matter of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams,* U.S. S.Ct. Case No. 00-1089.

As was included in the Reply Brief of Appellant, in this Court's Opinion in the matter of *PGA Tour, Inc. v. Martin,* 532 U.S.___(2001)(Slip Opinion, pages 12 and 13), the following was set forth:

"Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals. In studying the need for such legislation, Congress found that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with

> disabilities continue to be a serious and pervasive social problem." 42 U.S.C. 12101(a)(2);
> see 12101(a)(3)('[D]iscrimination against individuals with disabilities persists in such critical areas as employment, ... Congress noted that the many forms of discrimination takes include 'outright intentional exclusion' as well as 'failure to make modifications to existing facilities and practices.' 12101(a)(5).

PGA Tour, Inc. v. Martin, 532 U.S.___(2001)(Slip Opinion, pages 12 and 13.

F. Pro Se pleadings

As petitioner has been proceeding in the United States District Court and United States Court of Appeals without assistance of counsel, it would not appear unreasonable to respectfully request some leniency in the review of this petition and relief provided by Federal law, and in support, petitioner cites to the following:

"A *pro se* complaint, however inartfully pleaded, must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

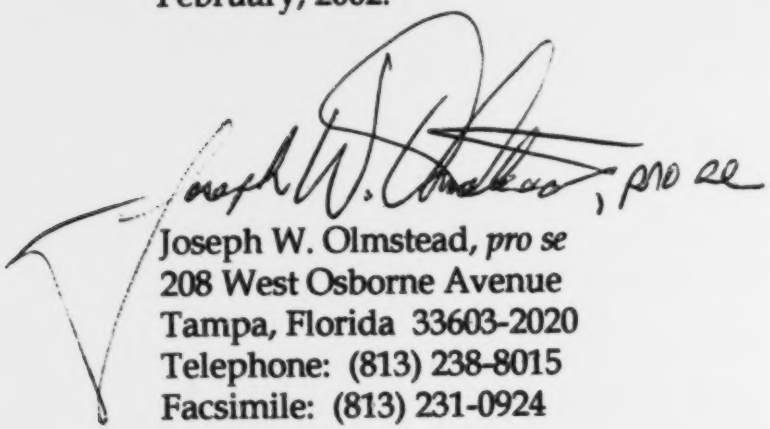
Haines v. Kerner, 404 U.S. 519, 520-521, 92 S.Ct.

594, 30 L.Ed.2d 652 (1972), quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

CONCLUSION

Petitioner respectfully requests this Court grant this petition for a writ of certiorari.

RESPECTFULLY SUBMITTED this 19th day of February, 2002.



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Petitioner

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-11182
Non-Argument Calendar

D.C. Docket No. 99-00746-CV-T-30-EAJ

JOSEPH W. OLMSTEAD,

Plaintiff-Appellant,

versus

WALTER INDUSTRIES, INC., d.b.a. Mid State Homes, Inc.

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(October 24, 2001)

Before TJOFLAT, BLACK and KRAVITCH, Circuit Judges.

PER CURIAM:

Joseph W. Olmstead appeals the district court's

order dismissing his claims against Walter Industries, Inc. under the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101 et seq. Olmstead contends that the district court erred in dismissing his claims because, according to Olmstead, Walter Industries, his former employer, violated his rights under the ADA in three ways: (1) by denying him the benefit of returning to work under its long term disability plan; (2) by violating his privacy rights; and (3) by retaliating against him for filing a claim with the Equal Employment Opportunity Commission. Upon review of the record, we find no reversible error.

Olmstead was employed as a data processor by Walter Industries for approximately eight years before he was diagnosed with AIDS in 1995. He took paid leave for one month, and then was placed on leave without pay. He contained to receive long term disability benefits. Two years later, while Olmstead was still on leave, Walter Industries changed his status from "active" to "terminated", although this change had no effect on his benefits. Thereafter, Olmstead filed a complaint against Walter Industries under the ADA. Later, he filed an amended complaint and various motions related to those claims. The district court, in two separate summary judgment orders and an order of dismissal, dismissed all of the claims and motions. Olmstead now appeals the dismissal of three of his claims.

Olmstead's first argument is that the trial court erred by granting summary judgment to Walter

Industries on the issue of Olmstead's right to return to work. [2] Olmstead contends that his long term disability plan grants him the right to return to work whenever he is able, and that he was discriminated against when Walter Industries denied him that right. A district court's grant of summary judgment is reviewed de novo, applying the same standards utilized by the district court. SEC v. Adler, 137 F.3d 1325, 1332 (11th Circ. 1998). The moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

To establish a prima facie ADA violation, Olmstead must demonstrate that he is "a qualified individual with a disability" and that he was "discriminated against because of that disability." Durley v. APAC, Inc., 236 F.3d 651,

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[2] In its order dismissing the case, the district court did not indicate whether it was ruling on Walter Industries' motion to dismiss or on its motion for summary judgment. By relying on the evidence submitted by Walter Industries, however, the district court must have been granting summary judgment. See Fed. R. Civ. P. 12(b) (if district court considers matters outside the pleadings in ruling on a motion to dismiss for failure to state a claim, then "the motion shall be treated as one for summary judgment ....").

657 (11th Circ. 2000). A qualified individual is one who can perform the essential functions of his job "with or without reasonable accommodation." 42 U.S.C. 12111(8). Olmstead has proffered no evidence that he is a "qualified individual" who is capable of returning to work with or without reasonable accommodation. Allowing an employee to take an indefinite leave of absence is not a reasonable accommodation. See Ducket v. Dunlop Tire Corp., 120 F.3d 1222, 1226 (11th Circ. 1997). Furthermore, the long term disability benefits plan does not grant Olmstead a right to return to work whenever he is able. We agree with the district court that, as a matter of law, Walter Industries did not violate the ADA by changing Olmstead's status from "active" to "terminated".

Olmstead also argues that the trial court erred by granting summary judgment to Walter Industries on his claims for interference with privacy. These claims stem from Olmstead's allegation that his medical records were stored in a location whey they could be seen by persons with no need or entitlement to see them. The district court granted summary judgment on these privacy claims as part of its "Order Denying Plaintiff's Motion for Reconsideration", which Olmstead has not appealed. Instead, Olmstead has appealed the district court's denial of his motions for relief from the summary judgment. The denial of a motion for relief from judgment is reviewed for abuse of discretion. Davis v. Fla. Power & Light Co., 205 F.3d 1301, 1304 n.4 (11th Cir.) cert. denied, 531 U.S. 927 (2000). There is no

provision of the ADA granting Olmstead the privacy he claims. Additionally, Olmstead has not pointed to any evidence that indicates that his medical records were seen by anyone without an employment-related need. The district court did not abuse its discretion in dismissing these claims.

Finally, Olmstead appeals the district court's granting of summary judgment to Walter Industries on his claim that he was retaliated against for asserting his rights under the ADA. This claim was not set out in Olmstead's notice of appeal. This court only has jurisdiction to review judgments specified in an appellant's notice of appeal. See Pitney Bowes, Inc. v. Mestre, 701 F.2d 1365, 1374-75 (11th Cir. 1983). Accordingly, we will not review the retaliation claim on the merits.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOSEPH W. OLMSTEAD,

Plaintiff.

v.

Case No. 8:99-cv-746-T-30C

WALTER INDUSTRIES, INC.,

Defendant.

ORDER DISMISSING AMENDED COMPLAINT

This cause came on for consideration of the Defendant's Motion to Dismiss Amended Complaint (Dkt. #118). The Court has reviewed the record in this case, including Plaintiff's opposition to Defendant's Motion, and heard oral arguments from the parties on February 22, 2001, and finds that Defendant's Motion is granted with prejudice for the reasons stated in open Court. The Court has carefully reviewed Plaintiff's claims and has found that the "Rehabilitation provision" on which Plaintiff relies does not require Defendant to re-hire Plaintiff. Likewise, the comments of Michael McDonald to the St. Petersburg Times do not create any contractual right between Plaintiff and Defendant.

APPENDIX B

The Court has also reviewed Plaintiff's remaining motions (Dkt. # 97, 120, 124, 128, 130, 131, 137, & 139), and finds that Plaintiff has not set forth any argument on which he is entitled to relief. Accordingly, it is hereby

ORDERED and ADJUDGED that

1. Defendant's motion to Dismiss Amended Complaint (Dkt. # 188) is GRANTED. Plaintiff's Amended Complaint is DISMISSED with prejudice.

2. Plaintiff's remaining motions (Dkt. -#97, 120, 124, 128, 130, 131, 137, & 139) are DENIED.

3. The Clerk is directed to close this file and deny all pending motions as moot.

DONE and **ORDERED** in Tampa, Florida on February 26, 2001.

/s
JAMES S. MOODY, JR.
UNITED STATES DISTRICT JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

APPENDIX C

[NOV 28 2001]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-11182

JOSEPH W. OLMSTEAD,

Plaintiff-Appellant,

versus

WALTER INDUSTRIES, INC.,
d.b.a. Mid State Homes, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the
Middle District of Florida

Before TJOFLAT, BLACK and KRAVITCH,
Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

APPENDIX C

ENTERED FOR THE COURT:

/s Phyllis Kravitch

UNITED STATES CIRCUIT JUDGE

Filed Stamp: U.S. Court of Appeals Eleventh Circuit NOV 28 2001 Thomas K. Kahn, Clerk

ORD-41

APPENDIX D

[DEC 27 2001]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-11182

JOSEPH W. OLMSTEAD,

Plaintiff-Appellant,

versus

WALTER INDUSTRIES, INC.,
d.b.a. Mid State Homes, Inc.,

Defendant-Appellee.

On Appeal from the United States District Court
for the
Middle District of Florida

ORDER:

( ) The motion of Appellant, Olmstead, for (X) stay () recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

(X) The motion of Appellant, Olmstead, for (X) stay () recall and stay of the issuance of the

mandate pending petition for writ of certiorari is GRANTED to and including Feb.20, 2002, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of Appellant, Olmstead, for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of Appellant, Olmstead, for a further stay of the issuance of the mandate is DENIED.

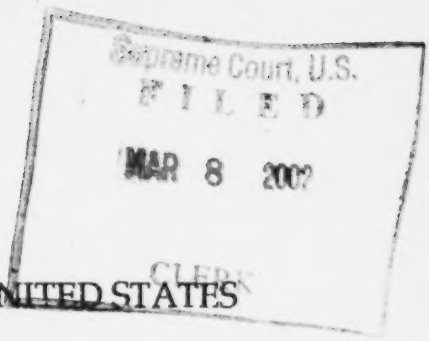
/s Phyllis Kravitch

_____

UNITED STATES CIRCUIT JUDGE

ORD-45

Filed Stamp: U.S. Court of Appeals Eleventh Circuit DEC 27 2001 Thomas K. Kahn, Clerk



(2)

No. 01-1221

IN THE
SUPREME COURT OF THE UNITED STATES

JOSEPH W. OLMSTEAD,

Petitioner,

v.

WALTER INDUSTRIES, INC.,
dba Mid State Homes, Inc.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER

Brief filed by:
Joseph W. Olmstead, *pro se*
208 West Osborne Avenue
Tampa, Florida 33603-2020
Telephone: (813) 238-8015
Facsimile: (813) 231-0924

208

LIST OF PARTIES TO THE ACTION

Joseph W. Olmstead, *pro se*, Petitioner

Walter Industries, Inc., Respondent

Mid State Homes, Inc., Subsidiary of Walter Industries, Inc., Respondent

TABLE OF CONTENTS

Description	Page Nos.
List of Parties to the Action	i
Table of Contents	ii
Table of Authorities	iii
Index of Appendices	iii
Supplemental Argument	1-10
Conclusion	10
Proof of Service	Filed separately
Appendices	Labeled A & B

TABLE OF AUTHORITIES

Robinson v. Shell Oil Co., 117 S.Ct. 843, 847 (1997), page 9.

INDEX OF APPENDICES

Appendix A - Notice of the United States Equal Employment Opportunity Commission of Right-to-Sue (Conciliation Failure), issued February 20, 2002.

Appendix B - Letter of Determination of the United States Equal Employment Opportunity Commission, issued November 28, 2001.

MAY IT PLEASE THE COURT to permit Joseph W. Olmstead, proceeding *pro se* ("petitioner"), to file this supplemental brief, which has been prepared in good faith and in accordance with Supreme Court Rule 15.8.

On February 19, 2002, petitioner filed 40 copies of a petition for a writ of certiorari ("petition") pursuant to Supreme Court Rule 33.1 with the fee and proof of service. Pursuant to information and forms furnished by the Clerk, the case was placed on the docket on February 25, 2002.

On February 20, 2002, one day after the petition was filed, the United States Equal Employment Opportunity Commission ("EEOC") issued a "right-to-sue notice (conciliation failure)" with respect to matters set forth in the EEOC's Letter of Determination and pending issues in this case between the parties; and those documents are included as Appendices A & B.

Petitioner is mindful that Rule 15.8 limits the content of a supplemental brief, as the Rule states:

> "8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form

for a brief in opposition prescribed by this Rule....".

As the petition filed on February 19, 2002 contained argument with respect to the questions presented for review, petitioner certifies that this brief has been prepared in accordance with the text and spirit of Rule 15.8 and Rules regarding form and service. Petitioner also certifies that this supplemental brief is submitted in good faith and is not being filed for delay or any other purpose.

Petitioner certifies that prior to filing this brief, in addition to serving within one business day the forms issued by the Clerk, which pursuant to Rule 12.3 are required to be furnished to Walter Industries, Inc. ("respondent"), on that same date, March 4, 2002, I conferred with respondent's counsel in regard to this brief; and respondent is opposed to supplementation.

For the reasons set forth in this brief and the affect of doctrines, including those of the "law of the case" and *res judicata*, petitioner respectfully argues that supplementation is appropriate.

One of the requests for relief sought in the District Court and Court of Appeals pertains to the issue of requesting consideration for *vacant* positions in accordance with respondent's usual and customary practices and procedures with respect to former employees and group plan participants.

On February 22, 2001, the District Court ordered that respondent is not obligated to re-hire petitioner. The District Court directed that petitioner could re-apply[1]; and pursuant to the instructions of the District Court, in addition to diligently requesting forms and other materials from the respondent (prior to and subsequent to the District Court's Order), as well as diligent follow-up efforts noted in an affidavit filed in support of a motion for stay, which was granted by the Court of Appeals, petitioner had sought consideration for eleven[2] (11) vacant positions for which I am qualified by training and experience.

As the respondent advised through counsel on the morning of February 15, 2002 of the respondent's position that re-hire will not occur, petitioner advised respondent that I will refrain from seeking consideration for vacancies.

Petitioner is mindful that it is an extraordinary request to seek this Court's review of the findings

---

[1] On forms prepared by respondent of record, there is indication that petitioner is eligible for re-hire.

[2] There have been more than eleven vacancies, however, petitioner has only applied for positions for which I am qualified; and those positions are: (1) Senior Mortgage Assistant; (2) Telemarketing Assistant; (3) Collections Clerk; (4) Senior Title Clerk; (5) Commissions Clerk; (6) Foreclosure Clerk; (7) Investigative Clerk for Human Resources; (8) Inside Collections Representative; (9) Title Clerk; (10) Lead Agent; and (11) Telemarketing Qualifier.

of an administrative agency at this stage of the litigation. The findings of the EEOC were issued *after* the Court of Appeals had issued the Decision and after a petition for rehearing was denied. As the District Court ordered that petitioner is entitled to no relief, petitioner prays this Court will consider the findings of the EEOC, allow the respondent time to brief the issue, and permit relief or proceedings as appropriate and just.

The Appendixes to this brief could not have been filed or brought to the attention of any Court below. On October 24, 2001, the Court of Appeals issued a Decision; and on November 28, 2001, the Court of Appeals denied a petition for rehearing. On that same date, November 28, 2001, the EEOC issued and mailed a Letter of Determination, which stated in pertinent part:

"Letter of Determination

> On behalf of the Commission I issue the following determination on the merits of this charge.
>
> Respondent is an employer within the meaning of Title I of the Americans with Disabilities Act (ADA) of 1990, as amended. Timeliness, deferral and all other requirements have been met.
>
> Charging Party alleged that since January 11, 2001, he has been denied hire because of his disability and in retaliation for filing a

previous charge of employment discrimination against the Respondent.

Examination of the evidence indicates that Charging Party is a qualified person with a disability, who has been denied hire by the Respondent. The evidence shows that Respondent chose to disregard medical opinion, and concluded that Charging Party is totally disabled. The evidence further indicates that Respondent retaliated against the Charging Party for filing a previous charge of discrimination. I have determined that the evidence obtained during the investigation establishes that there is a reasonable cause to believe that a violation of the ADA occurred.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practice by informal methods of conciliation. ....".

See Appendix B - Letter of Determination of the U.S. EEOC, dated November 28, 2001 and permitted to be disclosed after February 20, 2002 upon issuance by the Commission of a right-to-sue notice (conciliation failure).

In accordance with the confidentiality provisions of the conciliation process, which was set to begin within ten (10) days of November 28,

2001[3], petitioner has intentionally omitted such and certifies that the Commission advised on February 14, 2002 of the respondent's position submitted on or about February 13, 2002; and on February 15, 2002, the conciliation process concluded. As the respondent made clear on Friday morning, February 15, 2002 of its position regarding no re-employment now or at a future date, and as there was no resolution of the remaining issues set forth in the petition, it would appear reasonable and in the interests of finality, precious judicial resources and justice, for

---

[3] Petitioner certifies that in addition to agreeing on December 5, 2001 to fully cooperate to amicably resolve in good faith some or all of the issues between the parties, including the issue pertaining to requesting consideration for *vacant* positions, I had followed up with respondent through its counsel via telephone messages on December 21, 2001 and December 28, 2001; and no response was received. In addition, on January 22, 2002 and in follow-up to good faith efforts of prior dates, including but not limited to October 23, 2001 and November 29, 2001, I followed up respondent's agent at Heritage Consultants, Inc. ("Heritage"), who had advised on November 1, 2001, that Heritage had been awaiting information from Walter Industries, Inc.; and a copy of the correspondence was furnished to respondent. On January 28, 2002, Heritage advised as follows: "This letter is to acknowledge receipt of your January 22, 2002 correspondence. I am carbon copying Walter Industries and attaching a copy of your letter, as this is where any further correspondence should be sent. Thank you for your attention to this matter."

petitioner to respectfully request consideration of the materials of the EEOC during consideration of the petition for a writ of certiorari.

With respect to this brief, in the October 24, 2001 Decision of the Court of Appeals, the Decision stated, in pertinent part that "Olmstead has proffered no evidence that he is a "qualified individual" who is capable of returning to work with or without reasonable accommodation."

Petitioner pressed the issue below, including during proceedings in the District Court before dismissal on February 26, 2001 by submission on January 16, 2001 of an affidavit dated January 16, 2001 with physician's letter dated January 11, 2001 (R-4-123, pages 8-9 and Exhibit E), as well as in proceedings in the Court of Appeals, including on page 13, paragraph 28 of the initial brief, which referenced an affidavit filed on January 16, 2001 (R-4-123), which stated, in part:

> "... 26. As agreed, on January 11, 2001, I submitted a return-to-work letter from my physician and sent same to Heritage and Counsel by telefax and mail. See Exhibit E attached hereto....
>
> 27. I have advised the Company, Counsel and Heritage that I am able to return to work, qualified for a computer/clerical position and that my return will **not** pose any risk to any employees, as I do *not* have any

opportunistic infections or any other conditions which would put anyone at risk. I am aware and understand concerns of co-workers in working with a person who has HIV Disease and can assure all concerned that I am willing to do anything reasonably necessary to allay any fears; and there is no risk to anyone, as the work performed is office/computer work."

On pages 15-16 of the Brief of Appellant ("C. Statement of Facts (Relevant to this Appeal)) filed on May 8, 2001, petitioner stated:

"...5. On October 20, 2000, Employee's physician, a licensed medical doctor and specialist in the treatment of HIV Disease and infectious diseases, ordered comprehensive laboratory tests to determine the most optimum treatment plan; and Plaintiff's medications were changed to less pills and different dosing; and such has resulted in less side effects."

6. On December 18, 2000, Employee sought the forms and procedures to return to active employment in *any* available vacant position for which Employee is qualified by training and experience.

7. As the above forms were not received and as Employer's Agent advised that

> Employee must apply for and be accepted for a position, Employee contacted Employer directly on or about January 2, 2001, as instructed by Counsel on December 29, 2000. On January 11, 2001, Employee submitted physician's letter authorizing return to work."

The relief sought by petitioner, a former employee, is in accordance with other Decisions of this Court, including *Robinson v. Shell Oil Co.*, 117 S.Ct. 843, 847 (1997), which stated in part:

> "..For example, 706(g)(1) and 717(b) both authorize affirmative remedial action (by a court or EEOC, respectively) "which may include .... reinstatement or hiring of employees."

In this case, respondent's agents and employees, including representatives of the Human Resources Department and other managers and executives are and were aware of the facts of this matter. The delays and decision(s) to refuse to *consider* petitioner for *vacant* positions continued after petitioner satisfied all requirements in good faith and certified on page 20 of the initial brief filed May 8, 2001 in the Court of Appeals that:

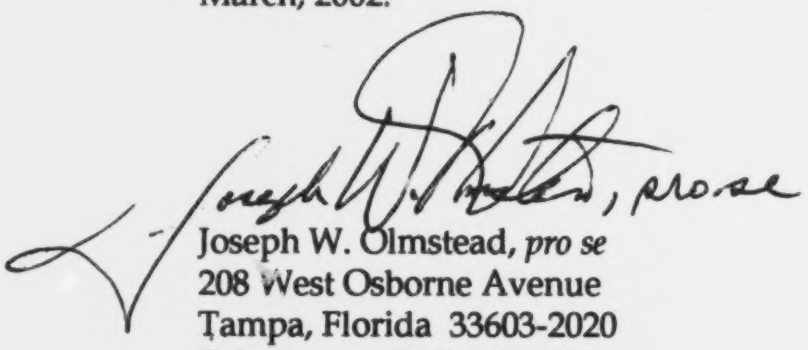
> "2. Employee is aware that in some instances, such as in other labor actions, that is unfeasible for an employee to return to a company's employ. Employee

argues that although the parties have been involved in litigation...; and although Employee has exercised rights with good faith belief that some relief is justified, Employee does not have any ill-will towards Employer or any employees."

CONCLUSION

Petitioner prays this Court consider this supplemental brief (with the determinations of the EEOC shown in the appendices) together with the petition for a writ of certiorari and grant the petition or grant other relief as appropriate.

RESPECTFULLY SUBMITTED this 8th day of March, 2002.



Joseph W. Olmstead, *pro se*
208 West Osborne Avenue
Tampa, Florida 33603-2020
Telephone: (813) 238-8015
Facsimile: (813) 231-0924
Petitioner

APPENDIX A

EEOC Form 161-A (10/96)

U.S. Equal Employment Opportunity Commission

NOTICE OF RIGHT TO SUE
(CONCILIATION FAILURE)

To:

Mr. Joseph W. Olmstead
208 W. Osborne Avenue
Tampa, Florida 33603-2020

From:

U.S. Equal Employment Opportunity Commission
Tampa Area Office
501 E. Polk Street, Room 1020
Tampa, Florida 33602

[ ] On behalf of person(s) aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7 (a)

Charge No.	151A11617
EEOC Representative	M. Melendez, Investigator
Telephone No.	(813) 238-2310

TO THE PERSON AGGRIEVED:

This Notice concludes the EEOC's processing of

the above-numbered charge. The EEOC found reasonable cause to believe that violations of the statute(s) occurred with respect to some or all of the matters alleged in the charge but could not obtain a settlement with the Respondent that would provide relief for you. In addition, the EEOC has decided that it will not bring suit against the respondent at this time based on this charge and will close its file in this case. This does not mean that the EEOC is certifying that the Respondent is in Compliance with the law, or that the EEOC will not sue the Respondent later or intervene later in your lawsuit if you decide to sue on your own behalf.

– NOTICE OF SUIT RIGHTS –
(See the additional information attached to this form.)

Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the Respondents(s) named in the charge. **Your suit must be filed WITHIN 90 DAYS from your receipt of this Notice.** Otherwise your right to sue based on the above-numbered charge will be lost.

Equal Pay Act (EPA): EPA suits must be brought in federal or state court within 2 years (3 Years for willful violations) of the alleged EPA underpayment. This means that **backpay due for**

any violations that occurred more than 2 years (3 years) before you file suit may not be collectible.

On behalf of the Commission

s/ Manuel Zurita — 2/20/02
Manuel Zurita, Area Director — (Date Mailed)

Enclosure
Copy of Charge

cc:

Walter Industries, Inc.
c/o Mark A. Hanley, Esquire
P.O. Box 3333
Tampa, Florida 33601

APPENDIX B

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Tampa Area Office

501 East Polk Street, Room 1020
Tampa, FL 33602
(813) 238-2310
TTY (813) 228-2003
FAX (813) 228-2841

EEOC Charge No: 151-A10-1617

Mr. Joseph W. Olmstead
208 West Osborne Avenue
Tampa, FL 33603

Charging Party

Walter Industries, Inc.
1500 North Dale Mabry Highway
Tampa, Florida 33607

Respondent

Letter of Determination

On behalf of the Commission I issue the following determination on the merits of this charge.

Respondent is an employer within the meaning of Title I of the Americans with Disabilities Act (ADA) of 1990, as amended. Timeliness, deferral and all other requirements for coverage have

been met.

Charging Party alleged that since January 11, 2001, he has been denied hire because of his disability and in retaliation for filing a previous charge of employment discrimination against the Respondent.

Examination of the evidence indicates that Charging Party is a qualified person with a disability, who has been denied hire by the Respondent. The evidence shows that Respondent chose to disregard medical opinion, and concluded that Charging Party is totally disabled. The evidence further indicates that Respondent retaliated against the Charging Party for filing a previous charge of discrimination. I have determined that the evidence obtained during the investigation establishes that there is reasonable cause to believe that a violation of the ADA occurred.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices by informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution of this matter. The confidentiality provisions of Section 107 of the ADA and Commission Regulations apply to information obtained during conciliation.

If the respondent declines to discuss settlement or when, for any other reason, a settlement

acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. An invitation to Conciliate is enclosed and should be returned to Commission representative, Maria Melendez, within 10 days after receipt. If no response is received within this time period, it will be interpreted as an unwillingness on the part of the Respondent to participate in conciliation efforts. At that time, conciliation efforts will cease.

You are reminded that Federal law prohibits retaliation against persons who have exercised their right to inquire or complain about matters they believe may violate the law. Discrimination against persons who have cooperated in Commission investigations is also prohibited, These protections apply regardless of the Commission's determination on the merits of the charge.

On Behalf of the Commission:

11/28/01
Date

s/ Manuel Zurita
Manuel Zurita
Area Director

cc: Mark A. Hanley, Esquire
Glen, Rasmussen, Fogarty & Hooper, P.A.
P.O. Box 3333
Tampa, Florida 33601